IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 10 of 1995

with

CRIMINAL APPEAL No 1088 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT and

MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MEGHSINH BHILUBHAI RATHVA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 10 of 1995
   MR BS SUPEHIA for Petitioner
   Mr. S.T. Mehta, Ld. APP for Respondent No. 1

2. Criminal AppealNo 1088 of 1995
   Mr. S.T. Mehta, Ld.APP for Petitioner
   MR BS SUPEHIA for Respondent No. 1

CORAM : MR.JUSTICE H.R.SHELAT and
MR.JUSTICE J.R.VORA
Date of decision: 19/01/2000

COMMON ORAL JUDGEMENT

Per: H.R. Shelat, J :-

1. Being aggrieved by the judgment & order dated 29th November, 1994, passed by the then Ld. Addl. Sessions Judge, Panchmahals at Godhra, in Sessions Case No. 66 of 1994 on his file convicting Meghsing Bhilubhai Rathva of the offence punishable under Section 304 Part-I I.P. Code, and sentencing him to R.I. for ten years and fine of Rs.500/-, in default R.I. for two months more; both, - the State of Gujarat and the accused have preferred these two appeals. Necessary facts in order to appreciate the rival contentions may be stated.

2. Meghsing Bhilubhai Rathva was residing with his wife Mangaliben at Kanpur Falia, Adval. Rimlabhai, Railabhai, and Naikabhai are his sons. After the marriage Rimla and his wife Ramani were residing separately in the neighbourhood. In the month of February 1994, Rimla had gone out. His wife Ramani was alone in the house. Hence to take care of Ramani and to give her company, Mangliben - wife of Meghsing Bhilubhai was during night time going to the place of Rimla and in the morning hours used to come back. On 9-2-1994 around 4.00 a.m. as alleged by the prosecution Meghsing Bhilubhai could not resist his orgasm. Any how he wanted to satisfy his carnal desire. He therefore went to the house of Rimla-his son where his wife Mangali was sleeping. He awaked his wife Mangali, but Mangali did not yield to his desire and hooted him out giving a push. Meghsing Bhilubhai lost the temper. He took the axe lying nearby and gave two/three blows on the head of Bai Mangali as a result of which Bai Mangali, sustaining fatal injuries, succumbed to the same. Meghsing Bhilubhai then went to the house of Police Patel Zinabhai Bharatsing and informed about the wrong he had done. The complaint was then came to be lodged by Meghsing Bhilubhai with Rajgadh Police Station. After the investigation was over, a charge sheet of the offence punishable under Section 302 of the I.P. Code was filed in the Court of J M F C, Devgadh-Baria. As the Ld. Magistrate was not competent to hear and decide the case relating to the offence of murder, he committed the same

to the Court of Sessions at Godhra, which came to be registered as Sessions Case No. 66 of 1994. The Sessions Case was then assigned to the then Ld. Addl. Sessions Judge at Godhra, who framed the charge at Exhibit-2. Meghsing Bhilubhai-the accused pleaded not guilty when the charge was read to him. The prosecution therefore led necessary evidence in order to prove the charge. Appreciating the evidence before him the Ld. Addl. Sessions Judge reached the conclusion that the charge relating to the offence punishable under Sec. 302 I.P. Code was not established, but the accused was liable to be convicted of the offence punishable under Sec. 304 Part-I of the I.P.Code. He therefore convicted Meghsing Bhilubhai of the said offence, acquitting him of the offence punishable under section 302 I.P. Code, and sentenced him as aforesaid. It is against that order of conviction these two appeals are filed. The Criminal Appeal No. 10/95 is filed by the accused Meghsing Bhilubhai challenging the conviction, while another appeal being Criminal Appeal No. 1088/95 is filed by the State submitting that the Ld. Addl. Sessions Judge ought to have convicted Meghsing of the offence punishable under section 302 I.P. Code and not relating to the offence punishable under section 304 Part-I, I.P. Code, etc.

3. As both the appeals arise out of the same judgment & order, and the issues that arise for consideration being common, we prefer to hear and dispose of both the appeals together so as to avoid waste of time and conflicting judgments. Accordingly both the appeals are heard and by this common judgment both the appeals shall stand disposed of.

4. Mr. Supehia, Ld. advocate representing the accused Meghsing contends that the Ld. Addl. Sessions Judge has fallen into error in even convicting of the offence punishable under section 304 Part-I, I.P. Code. In fact the charge either for the offence under section 302 or of the offence under section 304 Part-I, I.P.C. is not at all established. The cardinal principles of law are given a go-bye by the Ld. Judge. He then took us to the entire evidence as well as the judgment rendered by the lower Court, and pointed out how the Ld. Judge fell into error. In reply Mr. Mehta, Ld. APP has tried his best to refute the contentions raised and convince us that the Ld. Judge was perfectly right in holding that the accused caused the death of his wife Mangali by giving axe blows. Further, it is his contention that the Ld. Judge was not right in acquitting the accused of the offence punishable under

section 302 of I.P. Code and convicting him of the lesser offence, namely the offence punishable under section 304 Part-I of I.P. Code. He urges to allow the appeal and convict Meghsing Bhilubhai of the offence of murder of his wife.

5. On careful perusal of the evidence it becomes clear that the Ld. Judge has erred in even convicting the accused Meghsing of the offence punishable under section 304 Part-I. The case of the prosecution mainly hinges on the evidence of Zinabhai Bharatsing, Nanji Nura - one of the neighbours, and Ramaniben Rimla daughter-in-law of the accused. Before we proceed to deal with the issue that arises for consideration, it may be stated that the blood marks of 'O' group blood were found on the patola (sari worn by the deceased), quilt pillow, axe, and ground . The blood group of Bai Mangali- the deceased was 'O'. But that will not as submitted establish the charge levelled against the accused Meghsing. At the most the same would show that the incident of causing death of Mangali happened at the place where the blood was found. It would not answer the question who committed the wrong, or would not point the finger at Meghsing as the wrong doer. In order to know who committed the wrong, the prosecution therefore relies on the evidence of above said three witnesses which we will now be discussing.

6. Bai Ramani is examined at Exhibit-14. She no doubt in the examination-in-chief supports the case of the prosecution narrating the case of the prosecution which we have hereinabove in short stated. But her cross-examination cannot be lost the sight of because the evidence as a whole is to be considered, and is not to be segregated, and what is favourable to the prosecution or other party should be taken into account. In the cross examination she made it clear that her small baby Sangita was sick. As she was seriously ill she was not comfortable and therefore she was all the while crying and whimpering. She was trying to quieten her but failed for a considerable long time, with the result she had to keep herself awake. After Sangita fell asleep after assuagement, she could at late hours go to sleep. She was therefore having the sound sleep and woke up in the morning when Police Patel and Meghsing her father-in-law came to her place. She then made it clear that she did not see the incident, but shortly thereafter she again when asked, made it clear that she had seen the incident. The witness thus makes contrary statement on the point of witnessing the incident. At one stage she says that she had witnessed the incident, and at the another stage she

makes a contrary statement. When a witness on the same point makes contrary statement, better it would be to keep her evidence aside, and the Court should then determine the issue considering the other evidence and materials on record. As the evidence of Bai Ramani for this reason cannot be accepted for drawing any conclusion, the Prosecution has drawn our attention to the evidence of Nanji Nura who is the neighbour of Bai Ramani. Nanji Nura is examined at Exhibit-13. He has supported the case of the confession having been made, stating that early in the morning Meghsing Bhilubhai had been to the place of Police Patel. He confessed about homicidal death having been caused by him giving axe blows, but in the cross-examination he does not support this fact stating that Meghsing-the accused did not make any statement and remained calm and quiet all the while. This witness also thus makes contrary statement on the same fact. For the aforesaid reason the evidence of this witness also cannot be relied on for drawing one or the another conclusion. The same is required to be kept out of consideration.

7. If that is done, the only evidence of Zinabhai Bharatsing (Exhibit-12) remains on record for consideration. He is the Police Patel of the village. According to the prosecution, after committing the murder of his wife, Meghsing had gone to the Police Patel and confessed about the wrong having been done by him. The Police Patel no doubt supports the case of confession, but he also in the cross-examination makes contrary statement stating that Meghsing had been to his place and informed him that some one had committed the murder of his wife, and he wanted to lodge the complaint. He remaining quiet continued to sit on one side and uttered nothing. No one had questioned him. At last this witness also made it clear that he, from what was stated by Meghsing, became aware of the fact that he had not murdered his wife. Thus this witness also gives go bye to his earlier statement regarding the confession made before him. His evidence also for the aforesaid reasons cannot be accepted, but for a while if his evidence regarding the confession having been made is accepted, Meghsing on that base cannot be convicted, the prosecution has to retreat.

8. The question that arises for consideration is whether the confessional statement if at all made before the Police Patel is admissible in evidence. This Court came across with the similar question in the case of Vijaysing Dharmdas Thakkar Vs. The State of Gujarat, 1996 (1) GLH, 971, wherein it is held that the Police

Patel of the village is a Police Officer within the meaning of the word 'Police Officer' appearing in Section 25 of the Indian Evidence Act, and the confession made to the Police Patel is inadmissible in evidence. In view of this decision the confession if at all made before this witness who is the Police Patel, is inadmissible in evidence. Hence his evidence regarding the confession is also required to be kept out of consideration. Thus the evidence of all the three witnesses on which the prosecution relies is required to be kept out of consideration because it is not safe to place any reliance thereon. There is no other evidence on record which points to the guilt of Meghsing Bhilubhai - the accused. Consequently there is no legal evidence at all on record establishing the charge levelled against Meghsing - the accused. Ld. Addl. Sessions Judge fell into error in accepting the confessional statement made before the Police Patel and also in placing reliance on the evidence of above said witnesses. In view of the matter for want of legal evidence on record the accused cannot even be convicted of the lesser offence namely the offence punishable under section 304 Part-I of the I.P. Code. The conviction and sentence inflicted by the lower Court is therefore required to be quashed and set aside and the accused deserves to be acquitted.

9. When the prosecution has failed to prove the charge, the question of convicting of the the offence of murder does not survive for consideration. He deserves acquittal qua the offence of murder too. Consequently the Criminal Appeal No. 1088 of 1995 is required to be dismissed, and another appeal being Criminal Appeal No. 10 of 1995 is required to be allowed.

10. In view of what we have said hereinabove, the Criminal Appeal No. 1088 of 1995 is hereby dismissed, while Criminal Appeal No. 10 of 1995 is hereby allowed. The judgment & order convicting the accused of the offence punishable under section 304 Part-I, I.P.C, and sentencing him as aforesaid are hereby set aside and quashed; and the accused Meghsing is acquitted thereof and also of the offence of murder with which he was charged. He be set at liberty forthwith, if no longer required in any other case.

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